Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 144.

DARWIN C. ALLEN,
Plaintiff in Error,

against

THE SOUTHERN PACIFIC RAILROAD COMPANY,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF CALIFORNIA.

Brief of Defendant in Error.

WM. F. HERRIN,
MAXWELL EVARTS,
Of Counsel for Defendant in Error.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

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DARWIN C. ALLEN,
Plaintiff in Error,

AGAINST

THE SOUTHERN PACIFIC RAILROAD COMPANY,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF CALIFORNIA.

BRIEF OF DEFENDANT IN ERROR.

Statement.

On the 1st day of February, 1888, the Southern Pacific Railroad Company, the defendant in error and the plaintiff below, agreed to sell to Darwin C. Allen, the plaintiff in error, and the latter agreed to buy, certain land situated in the County of Tulare, California. Eighty-four contracts were executed, but they were all precisely alike, except as to the description of the land and the price thereof, and only one has been printed in the record (Rec., p. 4).

Under the terms of these agreements Allen was to pay one-fifth of the purchase money and a year's interest upon the balance at the time of the execution of

the contracts. The interest on the remainder of the purchase price was to be paid annually in advance at the rate of seven per cent. together with the taxes and assessments that might be levied upon the property, and the balance of the purchase money was due on the 1st day of February, 1893.

The railroad company claimed the tracts of land covered by these contracts as part of a grant of lands to it by Congress, but at the time the agreements were executed no patent had been issued by the Government therefor. It was expressly provided in the contracts that, upon the punctual performance by Allen of the conditions contained therein, the railroad company would "*after the receipt of a patent therefor from the United States*" execute and deliver to Allen "a grant, bargain and sale deed of said premises."

It was also particularly stated in the contract that the railroad company would "*use ordinary diligence to procure patents*" for the land, and "*that, as in consequence of circumstances beyond its control, it sometimes fails to obtain patent for lands that seem to be legally a portion of its said grant, therefore, nothing in this instrument shall be considered a guarantee, or assurance that that patent or title will be procured; that, in case it be finally determined that patent shall not issue*" (Rec., p. 5) to it, that then the railroad company should repay (without interest) to Allen all moneys that may have been paid by him on account of land which it fails to procure a patent for.

Allen did not pay in accordance with his contract the interest upon the balance of the purchase money which was due on the 1st of February, 1889, and he also failed to make the payments falling due upon the 1st of February, 1890, and the 1st of February, 1891 (Rec., p. 2).

This interest amounted in the aggregate under all the contracts to the sum of $4,343.19, to recover which sum the railroad company brought suit in the Superior Court of the County of Tulare, California, on the 6th day of August, 1892 (Rec., p. 3).

The complaint simply sets forth the facts in the case and is the ordinary pleading in an action for the breach of a contract, except that it asks for the equitable relief of foreclosure of defendant's interest in the lands in case he fails to pay the sums found to be due within 30 days from the entry of a final decree (Rec., p. 1). The answer consists entirely of a denial of certain allegations contained in the complaint. With his answer the defendant below filed a cross-complaint in which he sought to recover the money he had paid the railroad company on account of this land and also heavy damages by reason of a third party to whom he had undertaken to sell the land, having refused to complete the purchase (Rec., pp. 6–8). The ground for the recovery claimed in the cross-complaint was the alleged false representations made by the railroad company that it was the owner of the land under a grant from Congress. In its answer to the cross-complaint the railroad company denied the allegation of Allen that it was not the owner of said land and averred that it was the owner thereof under the Act of Congress of July 27th, 1866 (14 Stat. at Large, 292, 299) (Rec., p. 8).

The case was subsequently removed to the Superior Court of the County of San Francisco (Rec., p. 9) and was tried in April, 1893 (Rec., p. 10), after the final payment of the purchase money had become due on the 1st of February, 1893. None of the evidence offered by either party has been printed in the record, but the trial Judge found as facts all the material allegations contained in the complaint. He also found against the defendant upon all the material allegations in his cross-complaint, and as a conclusion of law from the facts as found by him the trial Judge held that the railroad company was entitled to a decree that defendant should pay the sum sued for within six months from the entry of the decree, and in case of his failure to do so that he should be foreclosed of all his right, title and interest in the premises, and that the plaintiff should be let into possession thereof.

The final decree was entered in accordance with the conclusions of the trial Judge upon the 9th day of November, 1893 (Rec., p. 13), and the defendant below immediately took an appeal to the Supreme Court of California (Rec., p. 14).

The appeal was first heard by the Court sitting in department (a division of the Court consisting of three Judges), which modified the final decree in certain respects (Rec., pp. 21-24). Afterwards the cause was argued before the Court in bank (seven Judges), which affirmed the final decree as entered in the trial Court (Rec., pp. 15-18).

The judgment of the Supreme Court of the State of California affirming the decree below was entered upon the 17th day of April, 1896 (Rec., p. 28), and on the 7th day of June, 1897, the plaintiff in error without filing any petition therefor applied to the Chief Justice of the Supreme Court of California for a writ of error bringing said case to this Court, and the writ of error was allowed (Rec., p. 27).

Since the trial of this case in the Superior Court of the County of San Francisco and on the 1st day of December, 1894, a patent for all of the land involved in this case except one section was issued to the defendant in error by the United States. The one section excepted from this patent was theretofore conveyed to the railroad company by the United States by a patent dated December 1st, 1891.

POINT I.

The writ of error was sued out after the expiration of one year from the date of the judgment sought to be reviewed and should therefore be dismissed.

An examination of the record shows that the judgment of the Supreme Court of California was entered upon the 17th day of April, 1896 (Rec., p. 28), and that the writ of error was not obtained until the 7th day of June, 1897 (Rec., p. 27). As we understand the provision of the statutes in this regard the writ of error was sued out a month and a half after the time allowed for obtaining it had expired.

By Section 1003 of the United States Revised Statutes it is provided that :

> " Writs of error from the Supreme Court to a State Court in cases authorized by law, shall be issued in the same manner, and under the same regulations, and shall have the same effect as if the judgment or decree complained of had been rendered or passed in a Court of the United States."

The last paragraph of the 6th section of the Judiciary Act of March 3d, 1891, entitled " An Act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes " (26 U. S. Stat. at Large, 826) reads as follows :

> " But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment or decree sought to be reviewed."

The foregoing regulation of the Act of March 3d,

1891, is and has been, since such act was passed, the only regulation in force relative to the time in which a writ of error from this Court to a judgment in the United States Circuit or District Court must be brought. The old rule was two years, but Section 1008 of the United States Revised Statutes, which so provided, was repealed by Section 14 of the Judiciary Act of March 3d, 1891, and the limit of one year in which to bring a writ of error to a judgment of a United States Court was substituted for the old period of two years.

As the regulations governing writs of error from this Court to a State Court are the same as the regulations in cases of writs of error from this Court to a United States Court (U. S. Rev. Stat., § 1003), we understand that the limit of one year in which to sue out a writ of error applies to writs of error from this Court to a State Court.

The old limit for bringing writs of error from this Court to review judgments of the United States Courts was five years (§ 22 of the Judiciary Act of 1789; 1 U. S. Stat. at Large, p. 85), and it was also provided by said act that a writ of error from this Court to review a judgment of a State Court should be issued "in the same manner and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a circuit court" (§ 25 of the Judiciary Act of 1789; 1 Stat. at Large, p. 86).

The change from the limit of five (5) years in which to review by writ of error a judgment of a United States Court under the Judiciary Act of 1789 to a period of two years in pursuance of the provisions of Sect. 1008 of the United States Revised Statutes was substantially and in every material respect so far as this question is concerned the same as the reduction of the limit of two years (§ 1008, U. S. Rev. Stat.) to one year under the Judiciary Act of March 3d, 1891.

After the change from five years to two years as the

period within which a writ of error from this Court to a United States Circuit Court or District Court must be obtained, it was contended that such change did not apply to writs of error from this Court to a State Court, inasmuch as no reference was made in § 1008 of the Revised Statutes to the State Courts, and that writs of error to such courts could still be sued out after the expiration of two years and within five years from the date of the entry of the judgment sought to be reviewed.

This question first came before this Court in the case of Cummings vs. Jones, 104 U. S., 419, when Mr. Chief-Justice WAITE delivered the opinion of the Court as follows :

> " This is a writ of error to the Supreme Court of Louisiana, brought more than two but less than five years after the judgment to be reviewed was rendered, and one of the questions raised on this motion is whether the limitation of two years prescribed by Sec. 1008 of the Revised Statutes, for bringing writs of error to the Circuit and District Courts, applies to writs of error to State courts. We have no hesitation in saying it does. Sec. 1003 provides that 'writs of error from the Supreme Court to a State court, in cases authorized by law, shall be issued in the same manner, and under the same regulations, and shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a court of the United States.' This is almost the exact language of a similar provision in the twenty-fifth section of the Judiciary Act of 1789, and we are not aware it was ever supposed that writs issued to the State court under that section were not subject to the limitation prescribed for writs to the Circuit Courts by the twenty-second section. In Brooks vs. Norris (11 How., 204) this seems to have been assumed, and a writ to a

> State court was dismissed 'on the ground that it is barred by the limitation of time prescribed by the act of Congress.' There was at that time no other limitation than the one contained in the twenty-second section."

See, also,
Scarborough vs. Pargoud, 108 U. S., 567.
Polleys vs. Black River Co., 113 U. S., 81.

It is not plain what distinction there can be between the case of the change of the Statute of Limitations from five (5) years to two (2) years, and the subsequent reduction of the period from two (2) years to one (1) year. If, in the former case, it was held that such change applied to writs of error from this Court to State Courts, it would seem to follow that the last change of the Statute of Limitations from two years to one would also regulate the practice in suing out a writ of error from this Court to a State Court in any case which can be reviewed by Sec. 709 of the United States Revised Statutes.

It may be said that the last paragraph of Section 5 of the Judiciary Act of March 3d, 1891 (26 Stat. at Large, p. 828), has some bearing in this matter, but we do not so understand it. This clause of the act is as follows:

> "Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the Statute providing for review of such cases."

The question of the jurisdiction of this Court over cases brought here by writ of error from the highest court of a State under Section 709 of the United States Revised Statutes, and the question of the construction of such Section 709, have nothing whatever to do with the question of the time within which the writ of error must be brought. In other words, the clause of the Judiciary Act of March 3d, 1891, just quoted, refers

solely to Section 709 of the Revised Statutes, and has to do entirely with its construction and the jurisdiction of this Court over cases brought here under its provisions from the State courts, and so far as we can see relates in no way to the limitation of time for bringing the writ of error, which is a question of procedure and not of jurisdiction.

In the 25th section of the Judiciary Act of 1789 (1 Stat. at Large, 85) will be found substantially the same provisions in regard to jurisdiction as are contained in Section 709 of the Revised Statutes, and also by reference to the regulations governing writs of error to United States Courts the Statute of Limitations of five years then in force. When the United States Statutes were revised the clear distinction between the two parts of this 25th section of the Act of 1789 was recognized by the revisers, and the clauses of the section relating to jurisdiction were incorporated in Section 709 of the Revised Statutes in Chapter Eleven, which is entitled, "Supreme Court-Jurisdiction," while the clauses relating to the Statute of Limitations—to the time within which appeals must be taken and writs of error must be brought—will be found in Sections 1003 and 1008 of the Revised Statutes under Chapter Eighteen, entitled "Procedure."

This is what we desire to point out here. The last paragraph of Section 5 of the Judiciary Act of March 3d, 1891 (26 Stat. at Large, 828), relates entirely to the jurisdiction of this Court, and has nothing to do with the question under consideration, which is merely one of procedure. The clause of the sixth section of the same act limiting the time within which to sue out a writ of error from this Court to a United States Circuit or District Court to one year after the entry of the judgment sought to be reviewed relates solely to a question of procedure, which is the only question now being discussed and must necessarily fix the limit within which to sue out a writ of error from this Court to a State court because of Section 1003 of the United States Revised Statutes, which so enacts.

POINT II.

This Court cannot take jurisdiction of this case, and the writ of error should be dismissed.

The only power of this Court to re-examine the judgments of the highest court of a State is conferred upon it by Section 709 of the United States Revised Statutes, which enacts that :

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity ; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity ; or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statue of, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

There are three distinct clauses of this section which give jurisdiction to this Court over judgments entered in the highest court in a State, but if this Court can take jurisdiction of the present case thereunder it must be under either the first or third clause, as there is no

suggestion in the writ of error or elsewhere in the record that the second is in any way applicable to it.

1. The first is: "Where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity."

2. The third is "where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of or commission held or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such constitution, treaty, statute, commission or authority."

There are many questions which have so often arisen in cases of this character and have been so many times decided that they may be regarded as definitely settled by this Court, and among others are the following:

(1) The title, right, privilege or immunity must be specially set up or claimed at the proper time and in the proper way.

(2) The petition for the writ of error forms no part of the record upon which action is taken here.

(3) The right on which the party relies must have been called to the attention of the Court in some proper way, and the decision of the Court must have been against the right claimed.

(4) At all events, it must appear from the record by clear and necessary intendment that the Federal question was directly involved so that the State Court could not have given judgment without deciding it; that is, a definite issue as to the possession of the right must be distinctly deducible from the record before the State Court can be held to have disposed of such Federal question by its decision.

These four propositions are referred to with others and stated to be settled law in the case of Sayward vs.

Denny, 158 U. S., 180, and it will be well to see how far the record in the present case conforms therewith.

In the first place, it is noticeable that there was no petition for the writ of error; at least, there is none printed in the record. The writ of error simply follows in a perfunctory and somewhat inaccurate manner the wording of Section 709 of the Revised Statutes. It, however, fails to say what statute of, or authority exercised under, the United States was drawn in question and their validity denied, and also what the title, right, privilege and immunity was which was especially claimed by Allen under such statute.

We, therefore, find nothing to assist us in the writ of error, but we do not know that this is a matter of any importance, for, if "the petition for the writ of error forms no part of the record upon which action is taken here," certainly the writ of error itself cannot do so.

We are left, therefore, to the record proper to ascertain what the title, right, privilege and immunity is which was specially set up and claimed by Allen, and under what statute of or authority exercised under the United States it arose. . .

The record in this case is very short. It consists of the pleadings, findings of fact, conclusions of law, final decree, and the opinions of the Court below. No evidence is printed. We have searched the pleadings in vain for any indication that the validity of an Act of Congress or an authority exercised under the United States was drawn in question in this case. It is true that in the cross-complaint of Allen, the defendant below, it is alleged that the railroad company was not the owner of the lands in question under a grant from Congress (Rec., p. 7), and in the answer to the cross-complaint the railroad company avers that it was the grantee of said lands under the Act of Congress of July 27th, 1866 (14 Stat. at Large, 292, 299).

It is not clear whether this Act of Congress is the statute of the United States which is referred to in

the writ of error, but as it is the only one referred to in the record it is safe to assume that it is.

It, however, does not appear that the validity of this statute was in any way doubted or questioned. There might be a question as to whether certain lands did or did not fall within the limit of a certain grant of Congress. This would be simply a question of fact, and would not in any way affect the general validity of the act in question. So in this case the claim by the defendant Allen that the lands referred to in the contract were not owned by the railroad company, and the denial of such claim by the railroad company merely amounted to a dispute as to whether the lands were within the provisions of the Act of 1866, and did not in any way draw in question the validity of such Act.

If, however, it were possible to say that such a contention did in fact draw in question the validity of the Act of 1866, yet the decision of the Court sustained its validity, and so furnished no grounds for a review of the judgment by this Court, for in order to give this Court jurisdiction under the first clause of section 709 U. S. Revised Statutes, it is necessary to find two facts present at the same time : (1) that the validity of the Statute was drawn in question, and (2) that the decision was against its validity. In the present case we find neither of these facts, but on the contrary the statute was never questioned ; and, if it was, the decision of the Court below was in favor, and not " against its validity," for the finding of the Court was that the railroad company was the owner of the land under the Act of 1866.

No federal question being raised in the pleadings and there being no evidence printed in the record, it is necessary to look at the findings of fact to discover whether the validity of any statute of or authority exercised under the United States was drawn in question in the decision of this case. The findings fail to disclose any questioning of the validity of any Act of Congress, and simply find that the railroad company

" is the owner of said lands in fee under the provisions of said Act of Congress " (Rec., p. 12).

In the four opinions of the Court below which are printed in the record (Rec., pp. 15–24), the validity of no Act of Congress is considered or discussed. In fact, no mention is made of any Act of Congress whatever, and the Act of July, 1866, is not once spoken of in any of the opinions. It is very clear from the opinions that the Court below never, for one moment, supposed that it was considering or disposing of any Federal question, or that any such question had been presented or had been intended to be presented to it, and simply understood what was, in truth, the fact, that the only question before it was the construction and meaning of the contracts entered into between the Southern Pacific Railroad Company and Allen.

It is also to be noticed that there is no assignment of error which, in any way, brings up the question of the validity of any United States statute or of an authority exercised under the United States, which was denied by the Court below. The assignment of errors is perfectly silent upon the matter, and there is no claim in any of the errors assigned that the Court below erred in its consideration of the validity of any Act of Congress, or of any authority exercised under the United States, or that it erred because its decision was against such validity (Rec., pp. 24–26).

What we have said in regard to the failure of the record to show that the validity of any statute of or authority exercised under the United States was drawn in question in the decision of this case and denied applies with still greater force to the second ground claimed for the exercise of the jurisdiction of this Court under the third clause of Section 709 of the Revised Statutes.

It is impossible to find in this record, from one end of it to the other, that Allen, the defendant below, claimed or set up any title, right, privilege or immunity, under any statute of, or authority exercised under, the United States, and that the decision of the Court

was against such "title, right," etc. There is certainly no title, right, privilege or immunity claimed or set up in Allen's answer or cross-complaint and no suggestion that any title, right, privilege or immunity was intended to be claimed or set up. It is not clear that any such privilege or immunity could be asserted except in the pleadings of the party claiming it, but we are unable to find, in any other part of the record, that any title, right, privilege or immunity under any statute of or any authority exercised under the United States is claimed or set up by Allen and that the decision of the Court below was against such title, right, etc. There is not even a suggestion of such a thing, and there is nothing in this record to indicate, in any way, that upon the trial of this case in the Superior Court of San Francisco or upon the argument before the Supreme Court of California, in department or in bank, either party or any of the Courts, ever for a moment, thought that any Federal question was raised in, or in any possible way connected with, the decision of this case.

It would, therefore, seem that this Court should decline to take jurisdiction of this case for the reasons just stated, and we refer hereafter to the authorities in this Court upon these questions.

(a)

THE VALIDITY OF NO STATUTE OF, OR AUTHORITY EXERCISED UNDER, THE UNITED STATES WAS DRAWN IN QUESTION IN THIS CASE, AND, EVEN IF IT WAS, THE DECISION OF THE COURT BELOW WAS IN FAVOR OF AND NOT AGAINST ITS VALIDITY.

It is somewhat difficult to seriously argue this question, for the reason that there is nothing in the record which seems to raise it. If, however, it is claimed by the plaintiff in error that the validity of the Act of July, 1866 (14 Stat. at Large, 292), was drawn in question, the answer is that the only question which arose in this case under that

act was simply whether the lands covered by the contracts referred to in this suit were within the provisions of the said act or not, which in no way concerned the validity of the statute.

In other words, the validity of a statute is not drawn in question every time rights claimed under such statute are controverted. Allen claimed that the land in question did not come within the provisions of the Act of 1866, and the Southern Pacific Railroad claimed that it did, but neither of them doubted that the act was a valid and proper exercise of the power of Congress.

As was said in the opinion in Cook County vs, Calumet and Chicago Canal Co., 138 U. S., 635, 653:

> "The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed."

In Ferry vs. King County, 141 U. S., 668, 671, Mr. Chief-Justice FULLER, speaking for the Court, said:

> "We have carefully examined the record in this case and have failed to find any intimation of the submission of a federal question to the State Court for decision, nor can we perceive that the judgment rendered necessarily involved the disposition of such a question. * * *
>
> "We have repeatedly held that the validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed."

If, however, it is possible to work out from this record that the validity of the Act of 1866 was drawn in question in this case, then its validity must necessarily have been questioned upon the ground that it did

not include within its provisions the land in controversy. Now, the only decision of the Court upon this is in the findings, where it is found as a fact that the railroad company was the owner of the land under the Act of 1866, so that any decision of the Court (if it can be said that there was one) was in favor of and not against the validity of the act, and this Court is, therefore, without jurisdiction of the case under Section 709, Revised Statutes.

In other words, in order that this Court may re-examine the judgment of the Supreme Court of California under the first clause of Section 709 of the Revised Statutes, it is not only necessary that the validity of the Act of 1866 or of an authority exercised thereunder should have been drawn in question within the proper meaning of these words, but it is also required *that the decision of the Court should have been against such validity.* Both of these conditions are necessary to give jurisdiction to this Court, but neither of them appears in this case.

(b)

THE CLAIM OF ANY TITLE, RIGHT, PRIVILEGE OR IMMUNITY UNDER ANY STATUTE OF OR AUTHORITY EXERCISED UNDER THE UNITED STATES (IF ANY SUCH CLAIM WAS EVER MADE AT ANY TIME OR IN ANY WAY, WHICH WE DENY) WAS NOT SET UP AT THE PROPER TIME AND IN THE PROPER WAY.

As we have before pointed out, it does not appear from the record that Allen, the plaintiff in error, ever claimed or set up any title, right, privilege or immunity under any statute of or authority exercised under the United States, and, as we understand the decisions of this Court, even if the State Court did by its final judgment deny any title, right, privilege or immunity of the plaintiff in error yet this Court has no jurisdiction, if such title, etc., was not set up or claimed in the Court below.

In Oxley Stave Company vs. Butler County, 166 U. S., 648, it was held that

> " This court cannot review the final judgment of the highest court of a State *even if it denied some title, right, privilege or immunity of the unsuccessful party*, unless it appear from the record that such title, right, privilege or immunity was ' specially set up or claimed ' in the state court as belonging to such party under the Constitution or some treaty, statute, commission or authority of the United States—Rev. Stat., § 709 " (syllabus).

If this Court has no power to re-examine a judgment of a State Court in which a title, right, privilege or immunity is denied unless such title, right, privilege or immunity is expressly set up or claimed in the Court below, it would seem to be clearly the rule in a case where there had apparently been no denial of any title, right, privilege or immunity and no such title, right, etc., had been specially set up or claimed.

In Mutual Life Insurance Co. vs. Kirchoff, 169 U. S., 103, the Oxley Stave Company case just referred to was

> " cited, quoted from and approved to the point that the words ' specially set up or claimed ' in Rev. Stat., § 709, imply that if a party in a suit in a state court intends to invoke for the protection of his rights the Constitution of the United States, or some treaty, statute, commission or authority of the United States, he must so declare; *and unless he does so declare ' specially,' that is, unmistakably, this court is without authority to re-examine the final judgment of the state court* " (syllabus).

In short, it has been held many times in this Court that, before it can take jurisdiction of a case brought

here from a State Court by writ of error upon the ground that a title, right, privilege and immunity of the plaintiff in error under some statute of or authoriy exercised under the United States has been denied, it must appear from the record that such title, right, privilege or immunity was specially set up or claimed at the proper time and in the proper way (California National Bank vs. Thomas, 171 U. S., 441; Kipley vs. Illinois, 170 U. S., 182; Levy vs. Superior Court of San Francisco, 167 U. S., 175; Chicago & Northwestern Railway Co. vs. Chicago, 164 U. S., 454; Dibble vs. Bellingham Bay Land Company, 163 U. S., 63; Winona & St. Peter Land Co. vs. Minnesota [No. 2], 159 U. S., 540; Sayward vs. Denny, 158 U. S., 180; Morrison vs. Watson, 154 U. S., 111; Miller vs. Texas, 153 U. S., 535; Powell vs. Brunswick County, 150 U. S., 433; Schuyler National Bank vs. Bollong, 150 U. S., 85; McNulty vs. California, 149 U. S., 645; Bushnell vs. Crooke Mining Co., 148 U. S., 682; Brown vs. Massachusetts, 144 U. S., 573; Leeper vs. Texas, 139 U. S., 462; Texas & Pacific Railway Company vs. Southern Pacific Co., 137 U. S., 48; Northern Pacific Railroad Company vs. Austin, 135 U. S., 315; Manning vs. French, 133 U. S., 186; Baldwin vs. Kansas, 129 U. S., 52; Chappell vs. Bradshaw, 128 U. S., 132; Clark vs. Pennsylvania, 128 U. S., 395; Brooks vs. Missouri, 124 U. S., 394; Spies vs. Illinois, 123 U. S., 131, 181).

There is no indication in the record that the State Court had the slightest idea that by its decision it was denying any title, right, privilege or immunity of the defendant below under a statute of or authority exercised under the United States. There is certainly no statement in any of the opinions from which any such inference can be drawn. There is not a single reference in the opinions to any Act of Congress, nor to any title, right, privilege, etc., claimed by Allen. The question, and the only question, considered and decided by the Court was the meaning and construction of the contracts referred to in the complaint.

In the case of Brown vs. Colorado, 106 U. S., 95, which was an action in ejectment brought by the State of Colorado, the plaintiff offered in evidence a deed from the defendant to the Territory of Colorado. Objection was made to its introduction upon the ground that the Territory of Colorado had no right to take a conveyance of real estate at the time of making the deed without the consent of the Government of the United States. This objection was overruled. When the case was appealed one of the assignments of error was to the effect that the Court erred in receiving this deed in evidence. The judgment was affirmed, thereby overruling the assignment, and upon this ground the case was brought by writ of error to this Court, where it was dismissed. Mr. Chief-Justice WAITE, in his opinion, at page 97 said :

> " The record furnishes no indication that any statute of the United States was brought to the attention of the Court below, and a ruling asked upon it in connection with the objection which was made to the admissibility of the deed. No Judge, in deciding upon the objection, as it was made and presented, would be likely to suppose that if he admitted the evidence he would deny the defendant any 'right, title, privilege or immunity ' ' set up or claimed ' under a statute of the United States. *Certainly, if the judgments of the Courts of the States are to be reviewed here for decisions upon such questions, it should be only when it appears unmistakably that the Court either knew or ought to have known that such a question was involved in the decision to be made.*"

In Susquehanna Boom Co. vs. West Branch Boom Co., 110 U. S., 57, it was said that :

> " Where the federal question insisted on in this Court, respecting a contract between a State

> and a corporation in the grant of franchises by the former to the latter, was not raised at the trial in the State Court, or where it does not appear unmistakably that the State Court either knew or ought to have known prior to its judgment that the judgment, when rendered, would necessarily involve that question, this Court cannot take jurisdiction of the case for the purpose of reviewing the judgment of the State Court " (syllabus).

(c)

EVEN IF A FEDERAL QUESTION WAS PRESENTED TO THE SUPREME COURT OF CALIFORNIA (WHICH WE DENY), NO SUCH QUESTION WAS DECIDED BY THAT COURT.

It certainly cannot be argued that any Federal question was considered by the California Court. There is not an expression of a single Judge which can be said to in any way indicate that he was deciding a Federal question. The decision of the Court is placed solely upon other grounds and is entirely a case of contract law.

This being so, it would seem to follow under the decisions that this Court cannot take jurisdiction of this case, for by the terms of the statute (Sec. 709) it is necessary that there should be a decision of the highest court of the State against the " title, right, privilege or immunity " claimed, and, if there is no decision upon the question, then a necessary ground of jurisdiction is wanting.

In Cook County vs. Calumet & Chicago Canal Co., 138 U. S., 635, 651, the Chief-Justice delivering the opinion of the Court said:

> " The rule is settled that to give this Court jurisdiction of a writ of error to a State Court it must appear affirmatively, not only that a Federal question was presented for decision by the highest court of the State having jurisdiction, but that its

decision was necessary to the determination of the cause, and *that it was actually decided*, or that the judgment as rendered could not have been given without deciding it. De Saussure vs. Gaillard, 127 U. S., 216; Johnson vs. Risk, 137 U. S., 300. Tested by this rule this writ of error cannot be sustained."

See, also,

Bushnell vs. Crooke Mining Co., 148 U. S., 682.

San Francisco vs. Itsell, 133 U. S., 65.

(d.)

THE MERE FACT THAT THE RAILROAD COMPANY EXPECTED TO OBTAIN A PATENT FOR THE LAND IN QUESTION DOES NOT CREATE A FEDERAL QUESTION WITHIN THE MEANING OF SECTION 709.

Because a case in a State Court indirectly and in some remote way relates to a question of a United States patent, is no ground for this Court taking jurisdiction.

In Gill vs. Oliver's Executors, 11 How., 529, it appeared that some time prior to 1817, Goodwin and others, under the name of the Baltimore American Company, agreed with a Mexican general named Mina to prepare a military expedition against the Spanish authorities in Mexico. After Mexico became a republic she recognized the services of Goodwin and awarded to him and his associates a large sum of money under the convention between the United States and Mexico. Gill claimed as assignee of Goodwin prior to his insolvency, and Oliver asserted title to the money under an assignment made by Goodwin subsequent to his insolvency. The highest Court of the State decided that the contract between Goodwin and Mina, being in violation of the neutrality laws of the United States, was not a subject of property and could not pass by force of the insolvent law of Maryland to Gill, his assignee. The case was brought to this Court by writ of

error, where it was dismissed for want of jurisdiction. Mr. Justice GRIER delivered the opinion of the Court and said at pages 546 to 548 :

> " That the Baltimore Mexican Company set on foot and prepared the means of a military expedition against the territories and dominions of the king of Spain, a foreign prince with whom the United States were at peace, is a fact in the history of the case not disputed, and which, if wrongfully found by the Court, would not give us jurisdiction of the case. * * *
>
> " The treaty and award are facts in that history. They were before the Court but as facts and not for construction. *If A hold land under a patent from the United States or a Spanish grant ratified by treaty, and his heirs, devisees or assigns dispute as to which has the best title under him,* this does not make a case for the jurisdiction of this Court under the 25th section of the Judiciary Act. If neither the validity nor construction of the patent or title under the treaty is contested, if both parties claim under it, and the contest arises from some question without or *dehors* the patent or the treaty, it is plainly no case for our interference under this section.
>
> " That the title originated in such a patent or treaty is a fact in the history of the case incidental to it, but the essential controversy between the parties is without and beyond it. * * *
>
> " It is a conclusive test of the question of juridiction of this Court in the present case, that if we assume jurisdiction, and proceed to consider the merits of the case, we find it to involve no question either of validity or construction of treaties or statutes of the United States."

So, in the case at bar, the patent to this land and the Act of 1866 are merely facts in the history of the case.

Neither one nor the other was presented below or comes up here for construction, and any consideration of the merits of the case shows that it involves no question of the validity of the Act of 1866 or of any patent from the United States, but is a simple case of the construction of a contract.

A writ of error to the Supreme Court of Michigan was dismissed by this Court in Michigan vs. Flint & Pére Marquette Rd. Co., 152 U. S., 363, in which the State of Michigan claimed certain lands under and by virtue of a grant by Act of Congress. The Supreme Court of Michigan held that the State was estopped from claiming title to the lands, and that was the only question decided by it. Mr. Chief-Justice FULLER, in delivering the opinion of the Court, said, at page 368 :

> " As its judgment thus rested upon the decision of a question which was not Federal, this Court has no jurisdiction to review it, and the writ of error must be dismissed."

The present case and the case just cited are somewhat similar. In each there was a claim of title under a grant from Congress, and in each the decision of the case was placed by the State Court upon a ground in no way connected with such Act of Congress. It is difficult to see how the case at bar can escape in this court the fate of the Michigan case, and we think it should be dismissed for the reasons given in the latter case.

POINT III.

If this Court can take jurisdiction of this case, then the judgment of the Supreme Court of California should be affirmed.

The contracts on which this suit was brought provided that Allen should pay one-fifth of the purchase money at the time the contracts were signed (February 1st, 1888), and the remaining four-fifths five years thereafter (February 1st, 1893), and that the railroad company should convey the land to Allen after the receipt of a patent therefor from the United States. Beyond this latter provision no time was specified within which the conveyance was to be made.

It was also stated in the agreements that the railroad company did not then have patents for the lands, but that it would use ordinary diligence to procure them; that it often failed to obtain from the Government patents to lands which clearly seemed to belong to it, and that, if it was finally determined that patents should not issue to the railroad company for this land, it would repay to Allen (without interest) the amount paid by him on account of the purchase price (the use of the land by Allen to offset the use of the money by the railroad company).

Although the complaint sought to recover simply the installments of interest upon the unpaid purchase money due upon the 1st day of February, 1889, 1890 and 1891, respectively, yet at the time of the trial of the case—viz., April, 1893—the balance of the purchase money had become due and the relations between the parties were considered as of the time the case was tried, and not as of the time when the suit was commenced.

The contention of the plaintiff below, which was sustained by the trial Court, was that the covenant on the part of Allen to pay the interest and the balance of the

purchase money due on February 1st, 1893, was independent of the covenant on the part of the railroad company to convey the land to Allen under a patent from the United States, and that the balance of the purchase money became due upon the 1st of February, 1893, and should then be paid without regard to whether the railroad company had then obtained a patent on the lands from the United States and was in a position to convey the same to Allen. In other words, the two covenants did not in any way depend upon each other, and the obligation of Allen to pay the interest and the balance of the purchase money on the 1st of February, 1893, still remained, even if the railroad had not conveyed or could not then convey the land to him, and was not incumbent upon the railroad company to show as a condition precedent to the recovery of the balance of the purchase money that it had made, or had offered or was ready to make, a conveyance of the land.

The only duty resting upon the railroad company was to use ordinary diligence to obtain a patent from the United States, and, after its receipt, to convey the land to Allen. The finding of the trial Court was that the railroad company "*had not been guilty of any want of ordinary diligence in instituting or prosecuting*" proceedings to obtain patents; that proceedings were then pending before the proper department of the Government of the United States, and that it had not been finally determined therein that a patent should not issue therefor. It is to be observed that the Government did issue a patent for this land to the railroad company on the 1st day of December, 1894.

Upon the appeal to the Supreme Court of California in department, the view of the Court seemed to be that the two covenants were dependent on each other, and if the railroad company had not obtained a patent for this land by the 1st of February, 1893, and was not then ready and able to convey this land to Allen, that then Allen was under no obligation to pay to it the interest or the balance of the purchase money which

fell due upon that day, and was entitled to be repaid the fifth of the purchase money paid by him at the time the contracts were executed on the 1st of February, 1888. In other words, the Court injected into the contract a condition not to be found in the instrument itself—to wit, that the railroad company was bound to obtain from the United States a patent for this land within five years from the date of the contract, and, if it failed to do so, Allen was under no obligation to pay the balance of the purchase money and the unpaid interest, and was entitled to repayment of the sum advanced at the time of the execution of the contract and to a rescission of the contract.

Upon the hearing of the case by the Supreme Court of California in bank the decision of the Court in Department was reversed and the final decree of the trial Court was affirmed, it being held that the two covenants were entirely independent, and that Allen's obligation to pay the balance of the purchase money due on February 1st, 1893, was unaffected by the question of whether the railroad company had then obtained a patent from the United States and could convey the land thereunder to Allen.

It is to be noticed as showing that no Federal question was presented to or in the mind of the Court when it decided the case that it is stated in the opinion of the Court below, sitting in bank, at page 16 of the record, that

"*The only question involved in the case is as to the construction of the contracts sued on.*"

There would seem to be no opportunity to discuss in this Court the question of whether the railroad company had or did not have title to these lands at the date of the execution of the contracts. The plain finding of the trial Court was that the railroad company did own the lands at such time. None of the evidence upon which that finding was made is incorporated in the record, and on the appeal in the State Court this question was not discussed, the State Court no doubt considering that it had no bearing

upon the question before it, and even if it did that the Court was bound by the findings of the trial Court. Further than that the United States has now granted to the railroad company a patent for the land so that all question as to whether the railroad company had the title to this land or not is now entirely removed from this case.

There is also nothing in the other findings which in any way disturbs the finding of the trial Court that the railroad company owned the lands in question. It may be urged by the plaintiff in error that the order of the Secretary of the Interior, made in 1867, withdrawing these lands from sale or settlement under the laws of the United States was revoked by an order made in 1887 and the lands restored to the public domain, as appears by one of the findings, and that therefore the railroad company could have no title thereto. It is, however, also found "that the loss to plaintiff of odd-numbered sections within said granted limits, *i. e.*, within twenty miles of said railroad, because of the various exceptions and reservations in said act provided for, is fully equal to all the odd-numbered sections within said indemnity belt."

It being found by the trial Court that the railroad company could not make up the losses in the primary limits, even if it had every odd-numbered section in the indemnity belt, it necessarily follows that all of these indemnity sections were appropriated by the grant without any action on the part of the Secretary of the Interior or selection by the company, as was decided in St. Paul and Pacific Railroad Company vs. Northern Pacific Railroad Company, 139 U. S., 1, 19, where it was said:

> "As to the objection that no evidence was produced of any selection by the Secretary of the Interior from the indemnity lands to make up for the deficiencies found in the lands within the place limits, it is sufficient to observe that all the lands

within the indemnity limits only made up in part for these deficiencies. There was, therefore, no occasion for the exercise of the judgment of the Secretary in selecting from them, for they were all appropriated."

This decision was followed in United States vs. Colton Marble & Lime Co., 146 U. S., 616, and it would therefore appear from these findings that the lands were actually appropriated under this grant.

Then, again, the finding of the revocation by the Secretary of the Interior of the order of withdrawal from sale had no effect whatever upon this title, as was held in St. Paul and Pacific Railroad Company vs. Northern Pacific Railroad Company *(supra)*, in which was involved the grant to the Northern Pacific Railroad in substance the same as the Atlantic and Pacific Act. The Court there said at pages 17 and 18 that

> "The Northern Pacific act directed that the President should cause the lands to be surveyed forty miles in width on both sides of the entire line of the road, after the general route should be fixed, and as fast as might be required by the construction of the road, and provided that the odd sections of lands granted should not be liable to sale, entry or pre-emption before or after they were surveyed, except by the company. They were thefore excepted by that legislation from grants, independently of the withdrawal by the Secretary of the Interior. His action in formally announcing their withdrawal was only giving publicity to what the law itself declared. The object of the withdrawal was to preserve the land unencumbered until the completion and acceptance of the road."

Upon the findings, therefore, of the trial Court, entirely independent of the patents since issued by the

Government to the railroad company, it is evident that the defendant in error had title to these lands, and there can be no question but that the contracts were valid and founded upon a sufficient consideration, and, as the State Court has said, "*the only question really involved in the case is as to the construction of the contracts sued on.*" In other words, when it comes to an examination of the merits of this case it is impossible to find any federal question in it or to make out of it anything but a simple case of contract.

The terms of the contracts are clear enough. The time for the payment of the purchase money by Allen is definitely fixed. One-fifth thereof was paid on February 1st, 1888. Four-fifths thereof was to be paid on February 1st, 1893. The time for the conveyance of the land by the railroad is also fixed—viz., after a patent therefor is procured by the railroad company from the United States. The contract contemplates the possibility that the plaintiff might not obtain a patent to the lands from the United States, and it is therefore definitely fixed when, in such a contingency, the contract should be terminated—to wit, when it was finally determined that a patent shall not issue to the railroad company. In that event the money paid on account of the purchase price was to be returned without interest.

The plaintiff in error will of course maintain, as he did below, that the true construction of this contract is that, if the patent from the United States is not procured within five years, the money paid on account of the purchase price must be returned to him and the contract rescinded. There is, however, no such provision in the contract. Neither is the contract uncertain upon this point. It expressly provides that the purchase money shall be returned when it is finally determined that the patent will not issue. This is the only time set for the termination of the contract. This event might have occurred and the claim of the railroad company to this land might have been finally

rejected by the Government prior to the 1st of February, 1893, when the balance of the purchase money was due. Then and in that case the railroad company was bound to repay Allen the one-fifth of the purchase price paid at the time of the execution of the contracts. On the other hand, it might not have been finally determined that the railroad company was not entitled to a patent until after the 1st of February, 1893, in which case the first payment of February 1st, 1888, on account of the purchase price, and the final payment of February 1st, 1893, must then be refunded by the railroad to Allen. That is to say it was contemplated by the contract that the time of procuring the patent was necessarily uncertain; that it might be obtained after the expiration of five years from the date of the contract or it might be obtained before. If before, then Allen would be entitled to a deed before he paid four-fifths of the purchase price. If after, then the railroad was entitled to the purchase money on February 1st, 1893, without making a conveyance of the lands to Allen, and Allen was entitled to a deed whenever the railroad company received a patent for the land or to be repaid the money paid by him on acount of the purchase price whenever it was finally determined that a patent would not issue.

These contracts are in no way ambiguous or uncertain in their terms, and the covenant in each to pay the purchase money is as independent of the covenant to convey the property as it is possible for language to make it. Allen agreed to pay the purchase money at a specified time; viz., February 1st, 1893. The railroad company agreed to convey at a stated time; viz., when it obtained a patent for the land from the United States.

It may, however, be argued that the time for the conveyance by the railroad is not fixed. We think it is. The contract particularly provides that the land shall be conveyed when the patent is obtained, whether before or after the payment of the purchase price, but,

even if the plaintiff in error were right in his contention, we do not see that it changes in any way the obligation upon the part of Allen to pay the purchase money on February 1st, 1893, without regard to the ability of the railroad company to then convey the property under a United States patent. In other words, the two covenants are separate and independent, and each is to be performed without regard to the other.

In Loud vs. Pomona Land and Water Company, 153 U. S., 564, the facts were as follows: The Pomona Land and Water Company made a contract with Loud by which it was to convey to him certain land upon the performance by him of certain covenants, among which was a covenant to pay the purchase price of $10,155 in the following manner: $2,539 on or before delivery of the contract; $3,808 on or before April 8, 1888; $3,808 on or before April 8, 1889.

Loud having failed to pay the purchase money, the land company brought an action against him in the United States Circuit Court for the Eastern District of Michigan, to recover the amount and alleged in the declaration that it was ready and willing, upon the making of the payments by Loud, to convey the land to him. There was no averment in the declaration of any tender by the water company of any conveyance of the land.

As a special defense the defendant set up "that the plaintiff did not, on the day when the last installment of the purchase price was made payable by the terms of said alleged contracts respectively, nor at any time, convey or tender a conveyance of the land * * * described in said contracts."

Upon the trial the Court directed a verdict for the plaintiff for the amount due and unpaid upon the contracts, and the defendant brought the case by writ of error to this Court, where the judgment was affirmed. The great discussion in the case seems to have turned upon the question whether the covenant to convey and the covenant to pay the purchase price were dependent

or independent, and whether the payment of the purchase price when it fell due could be compelled without any regard to the conveyance of or an offer to convey the land in question, and this Court was very clear in its decision that the two covenants were entirely independent of each other. Mr. Justice JACKSON delivered the opinion of the Court and said at pages 576 to 578:

> "The question whether covenants are dependent or independent must be determined in each case upon the proper construction to be placed on the language employed by the parties to express their agreement. If the language is clear and unambiguous it must be taken according to its plain meaning as expressive of the intention of the parties, and under settled principles of judicial decision should not be controlled by the supposed inconvenience or hardship that may follow such construction. If parties think proper, they may agree that the right of one to maintain an action against another shall be conditional or dependent upon the plaintiff's performance of covenants entered into on his part. On the other hand, they may agree that the performance by one shall be a condition precedent to the performance by the other. The question in each case is, which intent is disclosed by the language employed in the contract?
>
> "In this case there is no ambiguity in the language of the contracts. The covenant and agreement of the land company is that '*after* the making of the payment and full performance of the covenants hereinafter to be made and performed by the party of the second part (Loud), the party of the first part (the land company) will, in consideration thereof, convey by deed of grant, bargain and sale to the party of the second part, his heirs or assigns,' the described

lands, together with the designated shares in the irrigation companies. A subsequent clause of the contract provides that 'this instrument is not and shall not be construed as a conveyance, equitable or otherwise, and until the delivery of the final deed of conveyance, *or tender of all payments precedent thereto*, the party of the second part, his heirs or assigns, shall have no title, equitable or otherwise, to said premises,' and it is further provided that time is of the essence of the contract.

"If these terms and provisions of the contracts are to be understood in their plain and obvious meaning, they clearly express the intention of the parties to be that the purchaser shall first pay the purchase price of the lands contracted for before he is entitled to demand a conveyance therefor. It is also clear that the purchaser (the defendant below) could not have legally demanded from the land company a deed or conveyance for the lands until after the purchase money had been fully paid. The payment or tender of payment of the purchase price for the land was a condition precedent to the right to the conveyance. The authorities, both in England and in this country, fully sustain this construction of the contract. A brief reference will be made to some of the principal cases on the subject.

"In the learned note of Serjeant Williams to the early case of Pordage vs. Cole, 1 Saund., 320*a*, it is said that 'if a day be appointed for payment of money, or part of it, or for doing any other act, and the day *is* to happen, or *may* happen, *before* the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money or for not doing such other act *before* performance; for it appears that the party relied upon his *remedy*, and did not intend to make *performance* a condition precedent; and

so it is where *no time* is fixed for performance of that which is the consideration of the money or other act.'"

In Donovan vs. Judson, 81 Cal., 334, the plaintiff sued to recover the purchase price of certain land. The contract for the sale of the land was entered into between Margaret Donovan and the defendant Judson on March 24th, 1873, and among other things the defendant Judson agreed to pay the purchase price "within fifteen months after final judgment for plaintiff shall have been entered in the case of Egbert Judson vs. Paul Malloy *et al.*" Final judgment in the action of Judson vs. Malloy was entered and all litigation therein ended, on March 27th, 1873. Margaret Donovan died shortly after making the contract on the 23d of June, 1873. On the 11th of June, 1885, the probate Court directed the plaintiff Donovan, as administrator of Margaret Donovan, to make a deed to the defendant of the premises pursuant to the terms of the agreement. This was done and defendant took possession of the property, but declined to pay for it. On the 24th of July, 1886, this action was begun and the defendant demurred to the declaration upon the ground that the case was barred by the Statute of Limitations, inasmuch as the cause of action accrued against him fifteen months after the final judgment in the case of Judson vs. Malloy, viz., some time in 1874, and more than four years before the action was commenced. In other words, the defendant claimed that the covenant of payment and the covenant to convey were independent and that the payment became due at the time specified (15 months after final judgment in Judson vs. Malloy), without regard to the conveyance of the property. The demurrer was overruled, the case tried and a judgment entered in favor of plaintiffs. Upon appeal the judgment was reversed and the Court said at pages 337 and 338 :

"Counsel for respondent contended that no cause of action accrued against appellant until a conveyance of the interest of Margaret Dalton in the premises was executed to Judson; that the execution of such a conveyance was a condition precedent to the right to demand the sum which he covenanted to pay. By reference to the agreement it will be seen that Judson agrees to pay the sum specified 'within fifteen months after final judgment for plaintiff should have been entered in the case of Egbert Judson v. Paul Malloy *et al.*' The covenants to convey and to pay are independent covenants. No time is fixed for the execution of the conveyance. It might be executed before or after the time fixed for the payment of the sum to be paid by Judson. Had it been executed before that time no cause of action would have accrued for the recovery of the money before the time fixed for its payment. No time is fixed for the execution of the conveyance, and the case is clearly within the rule stated by Sergeant Williams in his note to Pordage v. Cole, 1 Saund., 320, which has been accepted in England and this country as a correct explication of the law on this question. He says: 'If a day be appointed for payment of money, or a part of it, or for doing any other act, and the day is to happen or *may* happen *before* the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act *before* performance, for it appears that the party relied upon his *remedy*, and did not intend to make the *performance* a condition precedent, and so it is where *no time* is fixed for performance of that which is the consideration of the money or other act.' In this case *no time* is fixed for the execution of the conveyance which Margaret Dalton covenants to execute to Judson. It is, therefore, clear that he did not intend to

make the performance of that covenant a condition precedent to the payment which he covenants to make at a specified time. In none of the many cases in which covenants have been held to be independant covenants were they more clearly so than in this case."

In Front Street M. & O. R. R. Co. vs. Butler, 50 Cal., 574, the defendant agreed to pay the plaintiff a certain sum of money in case the latter built a street railroad past his house. Ten per cent. of the amount was to be paid upon the beginning of the work, ten per cent. on the completion of four blocks west of a certain street, ten per cent. when the line should have been completed to a point opposite his house and ten per cent. in equal monthly payments thereafter. There was also a provision in the contract that the railroad should be completed within six months. The road was not completed within the six months required by the contract. The plaintiff brought an action to recover the amount due from the defendant under the agreement and was nonsuited below upon the ground that the road had not been completed in time. Upon appeal the judgment below was reversed upon the ground that the covenants were independent. The Court said at page 577:

> "The covenant to make monthly payments, after the first three payments, was independent—at least so far as the installments might become due prior to the expiration of the six months. The payment of money cannot be made dependent on the performance by the other party of a condition, which, by the very terms of the contract, is not to be performed, or may not be performed until after the date at which the money is to be paid."

The case of Reid vs. Davis, 4 Ala., 83, is very similar in its facts to the case at bar and was an action to enforce the payment of *purchase money payable by a day certain under a contract conditioned to make title* "*as*

soon as a patent therefor should be obtained from the United States." It was sought to defend the action upon the ground that no possession was takenunder the contract, and that the defendant had demanded a title which was refused, and that the contract was rescinded. The defense was overruled. The Court said:

> . " The fact that the defendant below never was in the actual occupancy of the land which he had purchased cannot relieve him from liability to pay the purchase money. His contract gave him the right of entry and enjoyment, and these invested him with the constructive possession. * * * *The condition of the plaintiff's bond did not oblige him to complete the title by any definite time, but when he should obtain a patent of land from the United States.* This was an undertaking to do an act upon an event which would happen, but the time when was uncertain; and, *before the obligor could be put in default for its non-performance, it must appear that the event has actually taken place, or has (at least) been delayed by his act or omission.*
>
> " The evidence recited in the bill of exceptions does not show that the plaintiff has done or omitted to do anything to prevent the issuance of patent, according to the regular order of business in the Land Office, and, in the absence of all proof, we must intend that no fault is attributable to him. We must, then, suppose that *the demand of a title was premature, and its refusal, under the circumstances, can avail nothing.* * * * If the defendant could, at his election, under any circumstances, rescind the contract for the refusal of the plaintiff to make a title, where the money was not tendered (a condition which we do not admit), he certainly could not in the present case, when the plaintiff was under no obligation to yield to his demand. Where the vendor of land executes a bond conditioned

to make title generally, and the vendor, in consideration thereof, makes his note payable to the vendor on a day certain, the failure to complete the title is not in itself a bar to an action on the note (*George & George vs. Stockton*, 1 Ala. Rep., 136; *Stone vs. Gover, Ibid.*, 287). And a vendee who holds the bond of his vendor, conditioned for the conveyance of a title upon a future event which has not happened, cannot occupy a more favorable position."

The plaintiff in Campbell vs. Jones, 6 Term Rep., 570, agreed to teach the defendant a certain mode of bleaching linen in consideration of the payment by the defendant of £250, and the further payment of £250 on the 25th of February, 1794, or sooner, if before that date the plaintiff should have instructed the defendant in bleaching linen. The plaintiff, after the 25th of February, 1794, sued the defendant to recover the second instalment of £250 without averring that he had taught the defendant how to bleach linen. The defendant demurred to the complaint, and the demurrer was overruled upon the ground that the covenants were independent and that the plaintiff was entitled to recover the second payment of £250 without regard to whether he had taught the defendant how to bleach linen or not. Lord KENYON in the course of his opinion said at page 572:

"The judgment of the Court must be in favor of the plaintiff, if upon the true construction of the deed a certain day be fixed for the payment of the money, and the thing to be done may not happen until after. The plaintiff in this case covenants with all possible expedition, not by any fixed time, to instruct the defendant in bleaching linen, &c., and in consideration of the plaintiff's covenants "the defendant covenants that he will on or before the 25th of February, or sooner, in

case the plaintiff should before that time have instructed the defendant, pay him the further sum of £250." To support the construction contended for by the defendant this covenant must be understood as if it had been written thus, " and the said Griffiths, the defendant, doth hereby covenant that he will on or before the 25th of February, in case the plaintiff shall before that time have instructed him, pay the further sum of £250," which is in effect covenanting to pay the money as soon as the plaintiff should have instructed him. Now, had this been the intention of the parties, the natural and obvious way of expressing such intent would have been for the defendant to covenant to pay as soon as he should be taught, but if the design of the parties were that the plaintiff at all events should be paid on the 25th of February, and sooner in case the defendant should be sooner instructed, the expression here used is a natural expression, and the words " in case the said Hector, the plaintiff, should before that time have instructed the said Griffiths," the defendant will be confined to the word "sooner."

In Couch vs. Ingersoll, 2 Pickering, 292, the plaintiff and defendant agreed, in March, 1822, to make an exchange of lands. The defendant agreed to give possession of his land on the 1st of April, and the defendant was to select his land on the 1st of July following. It was held that the two covenants were independent and that plaintiff could sue the defendant for failure to deliver possession upon the 1st of April without any regard to his own covenants. Judge WILDE delivered the opinion of the Court and said at page 300 :

" In the first place, it is clear that the first act was to be done by the defendant. He was to deliver possession of the lands in Lee and in the State of New York by the first day of April next after

the date of the contract; and nothing was to be done or performed by the plaintiff until after that time. This, therefore, is an independent covenant, and it is unnecessary for the plaintiff to show or aver performance of the covenants on his part. If a day is appointed for performing a covenant on one part, and it is to happen or may happen before the covenants on the other part are to be performed, the covenants are independent."

In Bean vs. Atwater, 4 Conn. Rep., 3, the facts were as follows: The plaintiff, on the 26th day of August, 1816, granted and sold to the defendant certain land in consideration of certain covenants to be performed and payments to be made by the defendant, and covenanted to give him a deed therefor on the 1st of June, 1817. The defendant agreed to pay on the land the sum of $4,000, $500 of which was to be paid immediately, $500 on the 1st of January, 1817, $500 on the 1st of June, 1817, and the other payments at different dates thereafter. Upon the trial of the action brought by the plaintiff to recover the money, it was held that the covenant to pay the first two installments of money was independent of the covenant to convey and that the plaintiff was entitled to recover the sum due thereon without averring or proving performance of the covenant on his part. At page 10, in the opinion of Chief-Justice HOSMER, it was said:

"It is a primary and fundamental rule concerning contracts that their construction must be according to the intention of the parties; and so paramount is this rule that to such intention even technical words must give way. When the inquiry is in relation to their dependence or independence this is to be collected from the evident sense and meaning of the parties; and, however transposed they may be in the covenants, their precedency must depend on the order of time

in which the intent of the transaction requires their performance.

"If the language of a contract will admit of it, justice and general convenience incline to the construction of a simultaneous performance; but, if a man will agree to pay his money before he has the thing for which he ought to pay it, and will rely upon his remedy, this is a law of his own making, and his agreement he ought to perform. * * * To investigate the intention of parties to a contract, certain auxiliary rules have been established. It was laid down by Lord HOLT in Thorpe vs. Thorpe, 1 Ld. Raym., 665, and since has been uniformly recognized, that if a day be appointed for payment of money, and the day must happen or may happen before the consideration of the money is to be performed, an action lies for the money before performance. The reason has already been assigned; it is that the party relied on his remedy, and did not intend the performance to be a condition precedent."

In the case of Coleman vs. Rowe, 5 How. (Miss.), 460, 466, the Court say—and this is the rule which has been followed by the Supreme Court of California:

"The general rule appears to be that the intention of the parties, to be gathered from the whole contract, is the criterion of the question. Thus, where a day is fixed for the payment of money, or part of it, and the day is to happen, *or may happen*, before the thing which is the consideration of the money is to be performed, an action may be brought for the money before performance; for it appears that the party relied upon his remedy."

In Seers vs. Fowler, 2 Johns. Rep., 272, the plaintiff, on the 5th of February, 1805, agreed to build and finish a house for the defendant before November 1st, 1805,

and the defendant agreed to pay therefor $750 on the 1st of May, 1805, and the balance of the purchase money as soon as the house should be completed. Plaintiff sued for the installment due upon the 1st of May, 1805, and it was held that he was entitled to recover. In the opinion of the Court it was said:

> "The covenants contained in the articles upon which this suit is founded must be considered mutual and independent. * * * The plaintiff's right of action for the 750 dollars accrued on the first of May; but at this time he could not aver a performance on his part, nor was he under any obligation to have been in a situation to make the averment. Where parties, therefore, by their contract place themselves in this situation, their covenants must necessarily be considered mutual and independent, so as not to render it necessary to aver performance."

A case very similar in its facts to the one just cited is Terry vs. Duntze, 2 H. Bl., 389, 392, where it was said: "Now, it is a rule long established in the construction of covenants, that, if any money is to be paid before the thing is done, the covenants are mutual and independent."

The following cases sustain the doctrine that where money is to be paid on a specified day, and the consideration for which the money is to be paid, may or may not be performed until after the date appointed for the payment of the money, the covenants are independent and the money, if not paid when due, can be recovered without proof of the performance of or of the offering to perform the consideration:

Brashier vs. Gratz, 6 Wheat,, 528, 538.
Eddy vs. Davis, 116 N. Y., 247.
Paine vs. Brown, 37 N. Y., 228.
Adams vs. Wadhams, 40 Barb., 225.
Northrup vs. Northrup, 6 Cow., 296.
Robb vs. Montgomery, 20 Johns, 15.
Harrington vs. Higgins, 17 Wend., 376.

Slocum vs. Despard, 8 Wend., 615, 619.
Tompkins vs. Elliot, 5 Wend., 496.
Hill vs. Grigsby, 35 Cal., 662.
Lord vs. Belknap, 1 Cush., 279.
George vs. Stockton, 1 Ala., 136.
Stone vs. Gover, 1 Ala., 287.
Sayre vs. Craig, 4 Ark., 16.
Mayers vs. Rogers, 5 Ark., 417.
Wright vs. Blachley, 3 Ind., 101.
Platt vs. Gilchrist, 3 Sand., N. Y., 125.
McCoy's Administrators vs. Bixbee's Administrators, 6 Ohio, 310.
Edgar vs. Boies, 11 S. & R., 445.
Manning vs. Brown, 10 Me., 49.
Bank of Sparta vs. Agnew, 45 Wisc., 131.
Gale vs. Best, 20 Wisc., 44, 48.
State vs. Winona & St. Peter R. R. Co., 21 Minn., 472.
Lowry vs. Mehaffy, 10 Watts, 387.
Battey vs. Beebe, 22 Kansas, 81.
Bailey vs. Clay, 4 Randolph (Va.), 346.

It would seem clear from this review of the authorities that, in the present case, the railroad company was entitled to recover the balance of the purchase money under these contracts due from Allen upon the 1st of February, 1893, even if it had not then obtained a patent for the land from the Government, and was not then in a position to give Allen a deed to the property in pursuance of the agreement between them to give such deed whenever the railroad company obtained a patent for the land.

(a.)

It may be argued in this court, as it was in the court below, that the railroad company by bringing this action and by asking for the relief demanded in its complaint rescinded this contract. In other words, the appropriateness of the remedy in this case may be criticised by the plaintiff in error upon the ground that an action for foreclosure could not be brought, because there was nothing due plaintiff at the time the action was

commenced except payments of interest which were due upon the deferred principal.

We understand this objection to be disposed of by the case of Hansbrough vs. Peck, 5 Wall., 497, in which the parties had agreed upon the sale of certain lots in Chicago for $134,000. The purchase money was payable in installments of $4,300, except the last, which was for $90,000 and was payable April 28th, 1861, some four years and three months from the date of the contract, together with semi-annual interest at the rate of ten per cent. per annum. Time was in terms made the essence of the contract in respect to payments. Under this contract the purchasers went into possession, and laid out $18,000 in improving the property. After erecting these improvements and paying two years' interest, the purchasers, becoming embarrassed or dissatisfied with their contract, were desirous of surrendering it, but were persuaded by the vendor to remain, and they paid the interest for another year, the last payment of interest being made on the 31st of January, 1860. After that no further payments were made, and April 21, 1861, before the time fixed for the payment of the principal, the vendor filed a bill in chancery in the State Court to prevent the removal of the buildings from the premises and to get possession of the property. At the time this suit was brought the purchaser was in default for nonpayment of about a year's interest, and the principal was not due, although it fell due a few days after the filing of the bill. On the 23d of August, 1862, a decree was entered restraining the removal of the buildings and putting the vendor into possession. After the rendition of that decree the defendant in the first case and the plaintiff here brought suit to recover back the money which he had paid on that contract, and also for the value of the improvements made, claiming, as is claimed here, that the first suit was really a suit for rescission, and that, having been rescinded, he was entitled to have restored

to him what he had paid upon it. Upon this point the Court said as to the first suit:

> "It is a proceeding in affirmance, not in rescission of it [the contract] by enforcing a remedy expressly reserved in it. Indeed, without such clause or reservation the remedy would have been equally available to him. It is a right growing out of the default of the purchaser, as the law will not permit him both to withhold the purchase money and keep possession and enjoy the rents and profits of the estate; nor will it subject the vendor to the return of the purchase money, if he is obliged to go into a court of equity to be restored to the possession.
>
> "In case of a default in the payments there are several remedies open to the vendor. He may sue on the contract and recover judgment for the purchase money and take out execution against the property of the defendant, and, among other property, the lands sold; or he may bring ejectment and recover back the possession; but, in that case, the purchaser, by going into a court of equity within a reasonable time, and offering payment of the purchase money, together with costs, is entitled to a performance of the contract; *or the vendor may go in the first instance into a court of equity, as in the present case, and call on the purchaser to come forward and pay the money due, or be forever thereafter foreclosed from setting up any claim against the estate. In these contracts for the sale of real estate the vendor holds the legal title as a security for the payment of the purchase money, and, in case of a persistent default, his better remedy, and, under some circumstances, his only safe remedy, is to institute proceedings in the proper court to foreclose the equity of the purchaser where partial payments or valuable improvements have been made. The Court will usually give him*

a day, if he desires it, to raise the money, longer or shorter, depending on the particular circumstances of the case, and to perform his part of the agreement. * * * And no rule in respect to the contract is better settled than this: That the party who has advanced money or done an act in part performance of the agreement, and then stops short and refuses to proceed to its ultimate conclusion, the other party, being ready and willing to proceed and fulfil all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done."

(b.)

It was insisted in the Court below that the provision in the contracts "that in case it be finally determined that patent shall not issue" was too indefinite, and that the contract might run forever. One answer to this is that a patent for this land has long ago been issued to the railroad company (viz., on December 1st, 1894); but, even if it had not been, the argument made by plaintiff in error in the lower Court in support of the suggestion of indefiniteness, that the principle of *res adjudicata* is not applied in the Land Department; that one Secretary can reverse another, and that there is no such thing as a final determination of the question whether a patent should issue, is without any force whatever.

There is nothing better settled in the Land Department than that it follows the principle of *res adjudicata*, just as this Court and every Court does. In the case of Kopperud, Vol. 10, Decisions of the Interior Department, page 93, an application was made to have a former decision rendered by Mr. Secretary Vilas overturned or repudiated, and a new order made. The application was denied, and Assistant Secretary Chandler in his decision said:

"Moreover, said decision was rendered by Mr. Secretary Vilas, and I am unaware of any rule of law that will warrant one head of a Department to reverse the final action of his predecessor, except in certain well-defined cases which are not present in the case at bar. In the case of Henry T. Wells (3 L. D., 196), Mr. Secretary Teller said: '"'If, as I think was the fact, Wells' whole claim was before Secretary Delano and passed upon in his decision, then that decision was final and conclusive, and the present claim is *res adjudicata* so far as this Department is concerned. It matters not that that decision may have been erroneous, or that the Department has since held differently. It is sufficient that it was a decision.'"

(c.)

At pages 26 to 28 and at page 62 of his brief the plaintiff in error maintains that there was a direct misrepresentation upon the part of the railroad company in the clause of the contract which reads as follows: "It is further agreed between the parties hereto that the party of the first part claims all the tracts hereinbefore described as part of a grant of lands to it by the Congress of the United States" (Rec., p. 5). The contention of the plaintiff in error is that the lands in question were not in fact granted by the United States to the railroad company by the Act of July 27, 1866 (14 Stat. at Large, 292), inasmuch as they were indemnity lands, while the Act of Congress only granted lands within the primary or place limits, and that the claim of the railroad company in its contract that the lands were granted to it by such act was a direct misrepresentation as to its title thereto.

It is not plain how such a clause can be considered a misrepresentation, as it is merely a statement by the railroad company that it claimed that the land in question was part of a grant to it; but, even if such a clause can in any way be deemed a misrepresentation,

it is not clear how it can now be considered in view of the finding of the trial Court that the land in question was granted to the railroad company by the Act of July 27, 1866 (Rec., p. 11), and the absence in this record of all the evidence upon which such finding was based.

If, however, this Court should feel called upon to consider this question, it seems to be simply whether lands within the indemnity belt referred to in the Act of July 27, 1866 (14 Stat. at Large, 292), were granted by such act to the railroad company, or whether such act granted only the lands within the place or primary limits.

It is difficult to see how the construction of such an act, in one way or the other, by both the parties to a contract could be considered a misrepresentation by one of the parties, but the claim of the railroad company that the lands in question were granted to it by such act has been sustained by the issue to it of a patent therefor by the United States, on the 1st of December, 1894.

Further than that, it has been held many times that the expression "lands hereby granted," found in Section 6 of the act referred to, includes indemnity lands as well as place lands.

In Northern Pac. R. Co. vs. United States, 36 Fed. Rep., 282, 287, Mr. Justice BREWER, then Circuit Judge, said:

> "Again, with reference to the suggestion that the expression 'lands granted' ordinarily refers in land legislation to lands in place, the truth is that the expression has a double meaning. Its narrower one is, of course, lands in place; but it is frequently used to include all lands donated by the Government, whether lands in place or indemnity lands (Barney vs. Railroad Co., 24 Fed. Rep., 889; Railroad Co. vs. Railroad Co., 112 U. S., 730; 5 Sup. Ct. Rep., 334). Indeed, in this

very resolution, the words are used in the larger sense. Thus, the proviso is, 'provided that all lands hereby granted to said company which shall not be sold or disposed of * * * at the expiration of five years, after the completion of the entire road, shall be subject to settlement and pre-emption, like all other lands,' etc. Obviously this refers to all the lands which had passed to the company, whether lands in place or indemnity lands. Further, and in the same clause, appears the same word, 'granted,' in manifestly the same sense, so that in the very resolution the words 'granted lands' or 'lands granted' are used in the larger sense, and it naturally enforces the conviction that they were used in the same broad sense in this clause."

In Wood vs. Beach, 156 U. S., 548, the defendant below "entered upon public land within the indemnity limits of a railway grant." The land had then been withdrawn from the market by the Secretary of the Treasury, under instructions from Congress. It was held that, by such entering, the defendant acquired no rights as against the railroad company which eventually selected the land. Judge BREWER, at page 551 said:

> "He [defendant below] deliberately took the chances of the railway company's grant being satisfied out of lands within the place limits, or by selections of lands within the indemnity limits other than this, and trusted that in such event this tract would be restored to the public domain and he gain some advantage by reason of being already on the land."

In Northern Pacific Rd. Co. vs. Barnes, 2 North Dakota Rep., 310, one of the questions involved was whether the railroad company had such a title to lands

within the indemnity limits of the Northern Pacific Act of July 2d, 1864 (13 Stat. at Large, 356), as would enable it to file a complaint to restrain the sale of such land for taxes. The Court held in the affirmative, and said at page 360:

> "The indemnity lands are therefore granted equally with the place lands, or lands within the forty-mile limits, by this act. They are of the 'amount of twenty sections per mile' granted, and the words 'thereby and hereby is granted' apply to them and pass the title. The only distinction between the two classes of land is the method by which they are identified. Once identified, the company has the same title to the one as to the other. The indemnity provision does not make an additional grant, but simply points out the method by which lands already granted may be identified."

In Chicago, etc., R'y Co. vs. Sioux City, etc., Rd. Co., 3 McC., 280, 300, it was said:

> "The lands in place and the indemnity lands were granted by Congress for precisely the same purposes. The intention of the grantor with respect to them was exactly the same. Both were subject to the same trusts. The mode of making the title of the trustee specific was different. * * *"

In his decision of the Chicago, St. Paul, Minneapolis and Omaha Ry. Co. case, 9 L. D., 465-468, rendered on October 7th, 1889, Secretary Noble, in construing the meaning of the phrases "*land hereby granted*," "embraced in the *grant of lands*," and like phrases, as used in the congressional acts granting railroad lands, made the following interesting review:

> "But it is urged that by the use of the expression '*grant of lands*,' Congress meant really

granted lands, or lands within the primary limits of the grant. I cannot concur in this view. The history of the legislation of Congress will doubtless show many instances wherein *indemnity*, and land other than place lands, are referred to as *granted* lands. One or two instances suggest themselves to me, and may be briefly referred to. By the 9th section of the Texas Pacific act (16 St., 576), it is provided that if, in the too near approach of said railroad to the Mexican border, the number of sections to which the company is entitled cannot be selected on the line of the road, then a like quantity of land may be selected elsewhere; 'provided that no public lands are *hereby granted* within the State of California further than twenty miles on each side of said road, except to made up deficiencies as aforesaid.' Here *indemnity lands* to be selected for other lost indemnity lands are included in the category of lands '*hereby granted*.'

"Also in the case of the Burlington and Missouri River grant, the only one of quantity without lateral limits now recalled, and where the land is to be obtained by *selection* anywhere along the line of the road, the language of the act is, that (Sec. 19, Act July 2, 1864, 13 St., 356), 'there be and hereby is *granted*,' provided the company accept '*this grant*' within one year, when the Secretary 'shall *withdraw* the lands embraced in *this grant* from market.' And the Supreme Court in 98 U. S., 334, construing the Act, speak of it all the way through as a '*grant*,' and of the lands as '*granted lands*,' and uphold the right of the company to select them anywhere along the general direction of the road, within lines perpendicular to it at each end. * * *

"So in 24 Fed. Rep., page 892, Barney vs. Winona, it was held that the expression 'lands which may have been *granted* to the Territory or State

of Minnesota,' includes *all lands* the title to which had passed to the Territory or State of Minnesota, whether these lands were lands in place or *indemnity lands*, and the word *granted* has the broad, rather than the narrow, significance.

" So in the St. Paul vs. Winona Railroad, 112 U. S., 730, referring to the significant fact that both acts there quoted speak of additional sections ' to be *selected*, a word wholly inapplicable to lands in place,' the Court says, ' we think, therefore, that these *additional lands granted* to the appellant * * * are lands to be selected.'

" These citations, doubtless, might be multiplied largely, but they are sufficient inasmuch as they show that the expressions '*lands granted*,' '*granted lands*,' '*lands within the grant*," and similar expressions, have not such narrow and technical meaning as to restrict the use of them to lands in place, or within the primary limits of a grant. On the contrary, such expressions are to be construed liberally and broadly, not standing alone, but in connection with the whole context of the act, and its true meaning gathered therefrom. Therefore, on a full consideration of the subject, I am of the opinionthat when Congress spoke of the failure of the Commissioner of the General Land Office to ' have the lands withdrawn from market embraced in the grant of lands,' etc., it meant the lands in both the primary and indemnity limits."

(d.)

Before submitting this case it would seem to be not improper to call the attention of the Court to the second paragraph of the 23d Rule of this Court, which is as follows :

" In all cases where a writ of error shall delay the proceedings on the judgment of the inferior

court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding 10 per cent., in addition to interest, shall be awarded upon the amount of the judgment."

An examination of the record shows the case to be one of simple contract decided by the State Court in accordance with a line of decisions covering more than a century. No Federal question was presented to the State Court and none was considered or decided by it, and under all the circumstances it seems to be clear that the writ of error was "sued out merely for delay" (West Wisconsin Railway Co. vs. Foley, 94 U. S., 100; Whitney vs. Cook, 99 U. S., 607).

POINT IV.

The writ of error should be dismissed or the judgment of the Court below should be affirmed with costs.

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No. 144.

Supp. Brf. of Herrin & Evarts for D. C.

Supreme Court of the United States.

OCTOBER TERM, 1898.

Filed Feb. 18, 1899.

No. 144.

DARWIN C. ALLEN,
Plaintiff in Error,

against

THE SOUTHERN PACIFIC RAILROAD COMPANY,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF CALIFORNIA.

Supplemental Brief of Defendant in Error.

WM. F. HERRIN,
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Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 144.

DARWIN C. ALLEN,
Plaintiff in Error,

AGAINST

THE SOUTHERN PACIFIC RAILROAD COMPANY,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF CALIFORNIA.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

First.

a.

The important question raised upon the reply brief of the plaintiff in error is as to the time within which a writ of error from this Court to the highest Court of a State must be sued out. Our position is that the writ of error must be brought within one year after the entry of the judgment sought to be reviewed. The other side contend that the limitation of time is two

years. The answer to the question will have to be found in the Judiciary Act of March 3d, 1891 (Suppl. to U. S. Rev. Stat., p. 901).

The last paragraph of Section 6 of the Judiciary Act is as follows:

> "But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment or decree sought to be reviewed."

It is said that this limitation of one year applies only to the judgments and decrees mentioned in the section of which it is the last paragraph, and that it does not relate to appeals from or writs of error to the Circuit and District Courts in the cases referred to in Section 5 of the act. If it should be held that the period of one year covers all cases brought to this Court, whether under Section 5 or Section 6 of the Judiciary Act, then, as we understand it, our contention that the writ of error in this case was brought too late will not be questioned.

It is perhaps important to notice that in the Supplement of the Revised Statutes this paragraph is printed separately and is not made a part of the paragraph of the section relating to cases coming from the Circuit Court of Appeals to this Court. This tends to show that the limitation was not to apply only to the 6th section of the act, but was to cover cases brought to this Court under the 5th section, and that the words "no such appeal shall be taken or writ of error sued out" referred to *all* the writs of error and appeals to this Court provided for by the act.

It is difficult to see any reason or purpose for having two statutes of limitations covering appeals to and writs of error from this Court. Certainly such a thing never was heard of before. The tendency of modern legislation is to simplify and make easy the procedure and practice in all litigation, and it would surely be a

step backward to now make two periods of time within which appeals to this Court shall be taken, one of one year and the other of two years. The purpose of Section 1003 of the United States Revised Statutes requiring writs of error to State Courts to be brought within the time prescribed for writs of error to Federal Courts was passed for the very purpose of having the time for bringing cases to this Court the same, no matter where the cases came from. To now say that the Judiciary Act of 1891 required some cases to be brought to this Court in one year and other cases in two years is certainly a new departure and not one to be encouraged unless the intention of the act to so declare is unmistakable. The confusion which would result therefrom is evident, and any construction of the statute which would obviate this difficulty is certainly to be desired.

In support of our view that the words "no such appeal" in the limitation paragraph of one year at the end of Section 6 of the Judiciary Act apply to all the appeals to this Court from the lower Federal Courts we desire to call to the attention of the Court Section 4 of the act, which expressly says that appeals to this Court from the District and Circuit Courts shall *only* be had "according to the provisions of this act regulating the same." This section is as follows :

> "But all appeals by writ of error or otherwise from said District Courts shall *only* be subject to review in the Supreme Court of the United States, * * * as is hereinafter provided, and the review by appeal, by writ of error, or otherwise, from the existing Circuit Courts, shall be had *only* in the Supreme Court of the United States * * * according to the provisions of this act regulating the same."

It is to be noticed that the act is particular to say that the regulation of appeals from the lower Federal

Courts to this Court is to be found "only" in this act. In other words, the whole scheme of the appellate jurisdiction of cases in the Federal Courts was changed by this act and a new plan substituted therefor, and all the rules and regulations which controlled it in the past were abolished and displaced by the provisions of the new act.

Such was manifestly the intention of the framers of this act, and such purpose was, we take it, clearly expressed by them in the 4th Section thereof. It is now claimed that this purpose must be defeated and that the old rules as to the review in this Court of judgments of the district and circuit courts must prevail. This contention is sought to be supported by requiring this Court to put a most narrow construction upon the words "such appeal" at the end of the 6th Section of the act. Narrow, even if it were not for the words of the 4th Section, and in view of the 4th Section clearly not the meaning which Congress intended to give thereto.

Further than this the general plan of the judiciary act was to shorten the time to take appeals. An appeal to the Circuit Court of Appeals from the final judgment of a District or Circuit Court must be taken in six months, a shorter time for an appeal from a final judgment than ever before provided. It could never have been intended that the time for an appeal from a final judgment of such lower courts direct to the Supreme Court should be four times as long. It could hardly have been meant by Congress that when a case had been dismissed in a District Court for want of jurisdiction, the party aggrieved should have two years in which to decide whether to appeal or not to this Court, the question of jurisdiction being the only question to be certified to this Court for decision. As we read the act it is plain that its framers never supposed they were making one limitation of six months for appeals to the Circuit Court of Appeals, another limitation of one year for appeals to this Court from the Circuit

Court of Appeals, and another limitation of two years for appeals to this Court from the District and Circuit Courts, but they very evidently intended that there should be one period of time covering all appeals to the Circuit Court of Appeals, and another period of time covering all appeals to this Court from any lower Federal Court.

We therefore submit that the words " such appeal shall be taken or writ of error sued out " refer to and were clearly intended by the framers of the act to refer to all the appeals and writs of error to this Court in the cases created by and mentioned in the Judiciary Act of 1891. Most of the appellate jurisdiction of this Court created by Section 5 of the act is new, and we can see no substantial objection to our view that the words " such appeal " are to be construed broadly and refer to all appeals to this Court whether they come under Section 5 or Section 6 of the act. Instead of putting in the limitation of one year in each section and so repeating it, it was inserted after all the appeals to this Court had been referred to, with the intention of including them all, and it is not plain how any other conclusion can be reached in view of Section 4 of the Court of Appeals Act.

b.

Even if it should be held that the limitation of one year applied only to appeals to this Court from judgments of the Circuit Court of Appeals, it is difficult to see how this in any way aids the plaintiff in error. His writ of error is still too late.

Section 1003 of the United States Revised Statutes enacts that writs of error to a State Court must be issued under the same regulations as if the judgment sought to be reviewed had been rendered in a Court of the United States. The text of the section is as follows:

> " Writs of error from the Supreme Court to a State Court in cases authorized by law shall be

issued in the same manner and under the same regulations and shall have the same effect as if the judgment or decree complained of had been rendered or passed in a Court of the United States."

We are, therefore, in the position of having two sets of regulations as to writs of error to judgments of the Federal Courts and the question is which of these two sets of regulations is to control the issuing of the writ of error to the State Court.

It would seem clear that the regulation in the case in the Federal Court, which most nearly approached the case in the State Court, would be the one to control. That is to say, the final judgment in the Federal trial Court must be reviewed in two years, but the judgment in a case which has been reviewed by one appellate court must be reviewed in one year. The case in the highest court of a State has, of course, been reviewed once or oftener on appeal, and the time within which the writ of error to such State Court must be sued out should follow the time provided for the review of the judgment in a Federal Court in a case which has been before an appellate tribunal, rather than the rule in regard to an appeal from the judgment of a Federal trial Court. In other words, a case decided by the highest court of a State is substantially in the position of a case decided by the Federal Circuit Court of Appeals and should, therefore, be governed in the procedure bringing it to this Court by the rules relating to writs of error from this Court to the Circuit Court of Appeals.

Second.

We do not know that anything needs to be added to what is contained in our original brief upon the supposed Federal question contained in this case.

The trial Court expressly found that plaintiff owned the land in question (Rec., p. 12), and there is no evidence in the record upon which this finding is based. The Court, however, makes the additional finding:

> "*That the loss to plaintiff of odd-numbered sections within said granted limits—i. e., within twenty miles of said railroad—because of the various exceptions and reservations in said act provided for, is fully equal to all the odd-numbered sections within said indemnity belt*" (Rec., pp. 11 and 12).

This finding having been made, it follows under the decision in St. Paul and Pacific Railroad Company vs. Northern Pacific Railroad Company, 139 U. S., 1, that the question of title of the defendant in error to the lands was unaffected by any act on the part of the Secretary of the Interior. (This whole question is discussed at pages 28 to 30 of our original brief.)

At page 7 of his reply brief the plaintiff in error says that the restoration of the lands to the public domain by the order of the Secretary of the Interior was "a final determination, within the terms and intendments of the contracts, that patents for those lands would not issue to that company."

The order of the Secretary of the Interior referred to was dated August 15, 1887 (Rec., p. 12), and the contracts in suit were dated in February, 1888. To say that such an order, made before the contract was entered into, was a final determination under the contract that patents would not issue for the land is too absurd and insincere to require further answer.

The question of whether indemnity lands, as well as place lands, are granted by the Pacific Railroad Acts

is fully discussed at pages 49 to 53 of our original brief.

We do not see that any answer is made in the reply brief of plaintiff in error to the point upon our original brief that the "title, right, privilege or immunity" of plaintiff in error was not specially set up or claimed by him in the State Court.

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